First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

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In This Issue: Grand Juries, p. 3
JUDY MEAD

The SWP and the FBI, p. 9
DAVID ATKINS

Coming: Oct.: FRED HAMPTON:
A Case of Political Assassination

In The News

June 10, 1976 The CIA agreed again to put a halt to its destruction of intelligence records, pending a decision by the new Senate Intelligence Committee. The destruction had resumed earlier in the month with the close of the Church committee investigation, but was opposed by Congressional critics who feared the destruction of records of past abuses. In related developments on June 11, District Judge June Green ordered the CIA to halt all destruction of documents in its Operation CHAOS files pending the resolution of *Halkin v. Helms;* the CIA agreed not to destroy any files related to its infiltration of domestic organizations in order to protect its security until it acts on a pending FOIA request for those files. (*New York Times*, 6/11/76, p. 4, and 6/17/76, p. 6)

June 11, 1976 The Senate Judiciary Committee, by a vote of 11-1, approved an amended version of the Ford Administration's national security wiretap bill (S. 3197). The bill is an improvement over the original proposal made in March, but it still leaves open the possibility of discretionary wiretapping of American citizens suspected of engaging in "clandestine intelligence activities," which includes non-criminal activities. On August 10th the Senate Intelligence Committee tenatively approved a substantially revised draft of the bill. (*New York Times*, 6/17/76, p. 25)

June 16, 1976 The National Security Council released portions of the "Secret Charter" of the intelligence agencies sought in an FOIA suit. The released documents include the NSC's Intelligence Directives (or NSCID's) which form the operational basis of the CIA since 1947. Claiming that release of the Senate Intelligence Committee's final report made disclosure of the NSCIDs possible, the NSC apparently reversed its position that their release would "jeopardize national security." Significantly, the documents contain nothing that would seem to require secrecy and thus the disclosure raises serious questions concerning the propriety of the executive's claims of the national security exemption. (*Washington Post*, 6/17/76, p. A2)

June 24, 1976 The CIA acknowledged that the FBI made a "mistake" in sending it a report on a peaceful American Indian Movement demonstration held in early June in which demonstrators carried placards denouncing the CIA. The FBI had previously agreed to end the practice of providing the CIA with domestic intelligence material. (*Washington Star*, 6/25/76, p. 4)

June 29, 1976 With the prodding of Rep. Bella Abzug's Subcommittee on Government Information and Individual Rights, the IRS agreed to begin notifying 775 out of the 11,458 taxpayers who were the targets of its now defunct Special Services Staff. IRS Commissioner Donald Alexander says that those notified can receive the information contained in SSS files without making FOIA requests. (*New York Times*, 6/30/76, p. C17)

August 1, 1976 In a letter released by Rep. Bella Abzug, Chairperson of the House Subcommittee on Government Information and Civil Rights, Attorney General Levi indicated that 19 victims of past FBI harassment will be notified by the Justice Department, and that in 71 other cases notice had been found to be inappropriate. Abzug stated that notification of "only 19 of thousands" who were targeted by the FBI's COINTEL Program was "thoroughly inadequate." She announced plans to press for passage of H.R. 12039, which would require notification of all subjects of such programs. (*Washington Post*, 8/1/76, p. A6)

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.
THOMAS PAINE

In The Courts

May 7, 1976 *Bell v. Department of Defense*, Civil Action No. 75-331 (D.N.H.) In an FOIA suit seeking access to classified intelligence data gathered by the Military Intelligence Services during the Second World War, District Court Judge Hugh Bownes ordered the government "to submit detailed affidavits specifying the reasons" why the documents should be exempt from disclosure.

May 21, 1976 *Huff* v. *Secretary of the Navy*, 413 F. Supp. 813 (D.D.C.) A system "of prior restraints for serviceman-to-serviceman distribution of material on-base during off-hours and away from restricted or work areas, is unconstitutionally restrictive of First Amendment rights." The court upheld restriction on off-base distribution in Japan because of the argument that such distribution might interfere in Japanese politics and hence violate the status of forces agreement.

June 4, 1976 *Halperin v. Colby*, Civ No. 75-676 (D.D.C.). Acting in an FOIA suit, District Court Judge John L. Smith upheld the CIA's right to keep its budget and expenditures secret. Noting that Congress itself has repeatedly refused to disclose the CIA budget, Smith held that the figures had been properly classified under the provisions of Executive Order 11652 and that "unauthorized disclosure . . . could reasonably be expected to cause serious damage to the national security . . . "

June 8, 1976 *Kipperman* v. *McCone*, Civ. Action No. C-75-1211-CBR (D.C. Cir.). In a report filed in the CIA mail opening lawsuit, the government revealed that it has found additional records on 2,000 persons subject to mail covers over a 20-year period. This discovery contradicts the sworn affidavit of former Director Colby which stated that a search of agency files had been complete and raises questions about the CIA's credibility in its response to individuals seeking information kept on them.

June 11, 1976 *Union of Concerned Scientists v. Nuclear Regulatory Commission*, Civ. Action No. 76-370 (D.D.C.) Order. Ruling that plaintiffs in FOIA suits should "have every reasonable opportunity to sustain their adversary position by way of devices customarily available to a litigant," District Court Judge Thomas Flannery allowed the Union of Concerned Scientists to send interrogatories to NRC.

June 11, 1976 *Church of Scientology of Washington v. Levi*, Civ. Action No. 75-1577, (D.D.C.) Order. District Court Judge John Lewis Smith ordered the government to supply a more detailed listing of material withheld from the Church of Scientology in its FOIA request. The judge found that the defendants' original "index" of requested documents (relating to Justice Department files on the church and its leader, L. Ron Hubbard) failed to conform to the requirements of *Vaughn v. Rosen*, 484 F. 2d 820 (D.C. Cir. 1973).

June 14, 1976 *U.S. Department of Defense v. Florence*, Civil Action No. 75-1869, (D.D.C.), Order. The Defense Department was ordered to release under the FOIA the unclassified sections of its Technical Abstract Bulletin after Chief Justice Burger vacated the temporary stays granted the government on June 1 and June 9. The Bulletin is a bibliographical listing of the Defense Department's research and development projects.

June 17, 1976 *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. , 44 U.S.L.W. 4883. The Supreme Court reversed a decision which had denied the President's authority to impose fees on imported oil for national security reasons. The court did not address the D.C. Circuit Court's narrow interpretation of inherent presidential power. Rather, its ruling was based on a different reading of congressional intent in the legislation which authorizes the imposition of supplemental oil license fees.

June 25, 1976 *Field Enterprises v. FBI*, Cause No. 76 C 497, (S.D.Ill.) Memorandum and Order. Acting on an FOIA suit, District Court Judge Alfred Y. Kirkland ordered the FBI to release its non-exempt surveillance files on the nuclear physicist J. Robert Oppenheimer to the *Chicago Sun-Times* within a reasonable period and to provide an index of withheld material. Taking notice of the Bureau's long delays, the judge asserted that the FOIA "requires that defendants take steps to process plaintiff's request without delay."

June 29, 1976 *Halperin v. Department of Defense*, Civil Action No. 76-1203 (D.D.C.). The ACLU filed an FOIA suit for release of deletions from the "Negotiating Volumes" of the Pentagon Papers. The plaintiffs contend that they should be released because they are improperly classified and were made part of the public record during the Ellsberg-Russo trial.

July 6, 1976 *Lamont* v. *Department of Justice*, 76-Civ.-3092 (S.D.N.Y.) and *Lamont* v. *CIA*, 76-Civ.-3091 (S.D.N.Y.) Socialist author and teacher Corliss Lamont filed under the FOIA seeking full release of security files kept on him; in the latter action, Lamont filed a $150,000 damage suit against the CIA based on evidence that the agency opened his first class mail.

July 7, 1976 *Open America v. Watergate Special Prosecution Force*, Civ. Action No. 76-1371 (D.C. Cir.) Ruled that "backlogged" government agencies are entitled to delays in filling FOIA requests and thus are justified in not complying with the Act's time limit requirements. *See also, Field Enterprises v. FBI.* The ruling reverses an order by the District Court that the FBI immediately release documents relating to L. Patrick Gray's role in the Watergate cover-up. In a related development, ten members of Congress have asked the General Accounting Office to investigate the FBI's delays in responding to FOIA requests.

In the Courts is continued on page 14.
See also "SWP and the FBI: A Chronology" on page 12.

In The Literature

Appears on page 14.

The Grand Juries
An American Inquisition

BY JUDY MEAD

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The federal grand jury, a body of twenty-three citizens who decide whether there is sufficient evidence to hold another citizen for trial, seems an unlikely weapon for the executive branch to use against dissent. Yet its purported investigatory powers, its protected secrecy, its appearance of independence, and its legal authority have made the grand jury one of the most powerful instruments for intelligence gathering and political disruption in use today.

Extraordinary Powers Of the Grand Jury

A sitting grand jury has enormous legal powers.

- A federal prosecutor can subpoena anyone to appear before a grand jury anywhere without explanation.
- Subpoenas can be issued for any records, correspondence, documents, fingerprints, hair samples, handwriting examplars, or other items of interest.[1]
- There is no limit to the number of witnesses who can be called, and no restrictions on the nature or number of questions that can be put to them.
- There are no rules about the kinds of evidence that can be used—rumors, hearsay, results of illegal searches or warrantless wiretaps, irrelevant or prejudicial information—all of which are inadmissible in open court.[2]
- The government may use informants without exposing their identity, for their cover is protected by the grand jury's secrecy.
- The witness enters the chamber alone, loses the right to remain silent and has no right to have a lawyer present—rights the witness would have even in a police interrogation.
- No witness need be informed of the purpose of the investigation, or even if he or she is its target; no witness has a right even to be warned that whatever he or she says could be used to bring charges against him or her.[3]
- A grant of partial immunity is often used to coerce testimony from a witness who invokes Fifth Amendment protection; a witness can be jailed without trial for contempt of court for up to eighteen months for continuing to assert that right after immunity is granted.
- Upon release, the same witness may be called before a new grand jury, asked the same questions, and jailed again for an additional eighteen months.
- Witnesses have no right to a transcript of even their own testimony; in fact, the prosecutor controls what, if anything, is recorded.[4]

In theory, some of these powers are subject to review by the courts; but in practice, the courts rubber stamp the prosecutor's whim.

The Change In The Grand Jury's Historical Role

Historically, the grand jury was to be a "people's panel" that would protect suspects against overreaching prosecutors and unwarranted prosecutions. The grand jury's primary function was to determine whether an indictment should be brought against the

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accused; it sat in judgment on the evidence presented by a prosecutor and acted as a check on his discretion. The eminent British legal theorist John Somers once wrote, "Grand juries are our only security, inasmuch as our lives cannot be drawn into jeopardy by all the malicious crafts of the Devil unless such a number of our honest countrymen shall be satisfied with the truth of the accusation."[5] Thus the framers of the American Constitution included a grand jury indictment as a right guaranteed by the Fifth Amendment.

In addition to its charging function, the grand jury has been accruing an independent investigatory role. It constitutes, as the Supreme Court has said, "a grand inquest, the scope . . . [not limited narrowly] . . . by questions of propriety or forecasts of the probable results of the investigation."[6] Its investigatory function was designed to insure that criminal activities that the police might be reluctant to investigate—the misconduct of the rich or powerful—could be pursued by citizens meeting together. The Supreme Court has thus consistently refused to limit the grand jury's authority and powers, "because the task is to inquire into the existence of possible criminal conduct, . . . its investigative powers are necessarily broad."[7]

It was the Justice Department of the Nixon administration that first turned the powers of this people's tribunal against political dissent and transformed the grand jury into an intelligence agency. Its motivation was similar to that which led the FBI to begin COINTELPRO. HUAC congressional investigations were no longer useful instruments to discredit political dissenters. The search for a weapon led the FBI to COINTELPRO and the Justice Department to the grand jury. The Nixon Justice Department recognized what had been true for decades: in operation, the grand jury was not so much a proud and independent people's panel as a pliant instrument of the prosecutor. As federal district court judge William Campbell concluded, "Today, [the grand jury] is but a convenient tool for the prosecutor. . . . Any experienced prosecutor will admit that he can indict anybody at anytime for almost anything."[8] Indeed, if one jury panel refuses to indict, a prosecutor may present the same evidence to another and another, until one agrees to return an indictment.

In 1969 and 1970, the Nixon Justice Department assembled the other elements necessary for a political grand jury network. Robert Mardian was named head of a revitalized Internal Security Division (ISD) in the Justice Department, which had been inactive since the McCarthy era. Its staff was increased from seven to sixty lawyers, and Mardian appointed Guy Goodwin, a forty-four year old prosecutor, to serve as head of a special litigation section within the ISD. Goodwin would serve as the field marshal, organizing a network of grand juries throughout the nation to locate "enemies" and gather evidence against them using grand jury investigations.

Forced Testimony

The last pieces were supplied by the Organized Crime Control Act of 1970, the Nixon administration's draconian police legislation. The act expanded the powers of federal grand juries, empowering the Justice Department to convene special investigative grand juries for eighteen months (with an extension of an additional eighteen months if desired) and by creating a more limited form of immunity for witnesses, called "use immunity."[9] Under "forced immunity," which was first imported into federal criminal law in 1954, if a witness refuses to testify, claiming his or her Fifth Amendment right against self-incrimination, a prosecutor can force immunity upon the witness, and thus "waive" any Fifth Amendment right to silence. Before 1970, only "transactional immunity" was available and limited to specified offenses, generally those associated with organized crime. ("Transactional immunity" meant that a witness could not be prosecuted for anything related to the transactions about which he was forced to testify.) The new use immunity was not limited to specific crimes and provided protection only from evidence gained from the testimony; if "independent sources" provided other evidence against the witness, a prosecution could still be brought for the same transaction. A recalcitrant witness could now be given immunity and jailed for contempt if he or she refused to testify. If he or she chose to testify, he or she might yet be prosecuted with "independent sources of evidence."

The Nixon administration argued that the use-immunity provision of the 1970 Organized Crime Control Act was needed to aid grand jury investigations of organized crime, but forced immunity has proved to be of little use in such cases. Informers in crime syndicates are killed; thus subpoenaed gangsters are often grateful for the opportunity to prove their loyalty by spending several months in jail for contempt. Use immunity is occasionally useful when forced upon peripheral movement people to gather intelligence, but its true value is as a weapon to put uncooperative witnesses in jail and to frighten others who are politically involved.

Using forced immunity to punish witnesses who refuse to cooperate is a fairly recent prosecutorial tool, and was first developed in an attempt to break up an organized crime syndicate. In 1965, two relatively unknown assistant U.S. attorneys in Chicago, Sam Betar and David Schippers subpoenaed

Sam Giancana, later famed as the Mafia contact in the CIA's assassination plots against Castro. Giancana was granted forced immunity and jailed for contempt of court when he refused to testify. Betar said, "Giancana went to prison. And jailing him created a state of chaos and fear in the minds of associates. At first they had thought we were just trying to grab some headlines with the grand jury. But once the lesser lights learned that we'd found a way to put the head of the whole show in jail, they didn't know how to cope."[10] Later Betar said, "I don't want to brag but I know we laid the groundwork for the way immunity provisions have been used in the past few years."[11]

The Nixon Political Grand Juries

By 1970, all the pieces were in place; all that was required was a Justice Department willing to abuse its prosecutorial responsibility. The Nixon administration supplied that ingredient. From 1970 to 1973, the ISD conducted over 100 Guy Goodwin-supervised grand juries in eighty-four cities of thirty-six states, called some 1,000 to 2,000 witnesses by subpoena, and returned some 400 indictments.[12] The indictments were often merely *pro forma*, to cover the real investigative purposes of the grand juries. The normal conviction rate on grand jury indictments is 65 percent; less than 15 percent of the 400 ISD indictments were convictions or pleas to lesser charges.[13] Targets included the Black Panther party, Vietnam Veterans against the War, Daniel Ellsberg, the Los Angeles antidraft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the American Indian Movement, the Movimiento Chicano, the women's movement, Irish unification supporters, labor unions, radical lawyers, and legal workers. Senator Edward Kennedy, reviewing the campaign in 1973, summarized the situation:

> *The use of "political" grand juries by the present administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's. In this respect, the Internal Security Division of the Justice Department represents the Second Coming of Joe McCarthy and the House UnAmerican Activities committee. But the abuses of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny . . . .*[14]

Intelligence Collection

The political grand juries used the pretense of investigating crimes to collect massive amounts of information on radicals throughout the country. One of the first major Guy Goodwin panels was convened in Tucson, Arizona, in October 1970. Goodwin subpoenaed five young activists from Venice, California, to testify about an alleged purchase of dynamite, *after* an indictment had already been returned against the man who allegedly bought the dynamite. The grand jury was used to develop in-depth information about radical activities in southern California. Goodwin asked questions such as "Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation and whom you visited during the time of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970."[15] The five witnesses at first refused to testify and spent five months in jail for contempt of court. As they left the jail, Goodwin subpoenaed them again before a new grand jury. At that point, three faltered and testified.

Since their purpose is to collect information, political grand jury investigations are characterized by the sweeping questions asked regarding memberships in political organizations, names of other members, and the activities of the groups. Guy Goodwin has become famous for asking such questions as:

> *Seattle—May, 1972: "Tell the grand jury every place you have lived for the last two years prior to this date, advising the grand jury the period of time you lived at each location, with whom, if anyone, you resided, and what occupation or employment you had during each period.*
>
> *Tucson—November, 1970: "I would like to ask at this time if you have ever been a member of any of the following organizations, and if so, to tell the grand jury during what period of time you belonged to any of these organizations, with whom you associated in connection with your membership in any of these organizations, what activities you engaged in and what meetings you attended, giving the grand jury the dates and conversations which occurred: The Save Our Solviers Association, the Coalition, the Los Angeles Reserve Association, the Peace and Freedom Party, the Humanistic and Educational Needs of the Academic Community Organization?"*
>
> *Detroit—June, 1971: "I would like to know if you*

were in Ann Arbor in the early part of February, 1971, and if you met any people in Ann Arbor who lived in Washington, or who you later found out lived in Washington; and if so, who were they, where did you meet, and what conversations were had?"[16]

Goodwin subpoenaed Leslie Bacon from Washington, D.C., to testify before a Seattle grand jury as a material witness in the bombing of the nation's Capitol. Goodwin questioned her primarily about upcoming Mayday activities and her political activities in the previous two to three years. Ms. Bacon was later indicted on perjury and conspiracy in New York, but all charges were dropped by the government. Recently an FBI official, who had direct knowledge of the investigation, admitted, "We didn't know a damn thing. Leslie Bacon was the only thing we had and that was just a fishing expedition. She was called before a grand jury in Seattle because we thought we were more likely to get an indictment out there."[17]

The Grand Jury: Disrupting And Discrediting Political Organizations

Grand juries have also been used effectively to disrupt legitimate political activities, a sort of quasi-judicial COINTELPRO. For example, in 1972, the Vietnam Veterans against the War (VVAW) planned a series of demonstrations at the Democratic and Republican political conventions, both scheduled to be held in Miami in July and August. Three days before the Democratic Convention opened, Guy Goodwin issued a first batch of twenty-three subpoenas to members of the VVAW, almost all either national, regional, state, or chapter organizers throughout the South. They were called to a grand jury in Tallahassee, 500 miles from Miami, on the very day their demonstration was scheduled to take place in Miami. Many were held a week, asked a few desultory questions and released. Five were jailed for up to forty days until their contempt citations were reversed. Eight veterans were ultimately indicted for conspiracy to engage in violence at the Republican convention in August. All defendants were acquitted by the trial jury on all counts. But VVAW's activities were totally disrupted, the organization severely weakened, and falsely branded as terrorist. On July 13, the Democratic convention passed a resolution condemning "this blatantly political abuse of the grand jury to intimidate and discredit a group whose opposition to the war has been particularly moving and effective."[18] A recent Fifth Circuit Court decision in a related case said the VVAW grand jury proceedings were "part of an overall governmental tactic directed against disfavored persons and groups . . . to chill their expressions and associations."[19]

The use of the grand jury for political purposes, perfected during the Nixon administration, is described by Moore's *Federal Practice:*

[W]hen technical and theoretical distinctions are put aside, the true nature of the grand jury emerges—i.e., it is 'basically . . . a law enforcement agency.' Nowhere is this characterization more apt than in considering the use of grand jury proceedings by the Nixon Administration. In Nixon's war against the press, the intellectual community and the peace movement generally, the federal grand jury has become the battleground.[20]

Recent Political Grand Juries

The grand jury continues as a major battleground. Although the use of political grand juries temporarily ceased during the Watergate investigation, there has been a resurgence of grand jury abuse under Attorney General Edward Levi.

When the Watergate scandal broke, disclosing illegalities committed by the highest officials of the Justice Department (Mitchell, Kleindienst, and Mardian), the Internal Security Division was disbanded and subsumed into the Criminal Division of the Justice Department. However, spokesmen for the Justice Department assert that the shift indicates no change in policy, and the new head of the ISD, Kevin Maroney, has confirmed that the ISD will continue to investigate "politically motivated crimes" and to use grand juries as it has in the past.[21] Guy Goodwin remains an employee of the Criminal Division of the Justice Department.

The same pattern of abuse of grand juries as intelligence-gathering operations with COINTELPRO objectives has reemerged with the FBI giving more decisive direction. FBI agents increasingly threaten with grand jury subpoenas citizens who refuse to answer their questions. Subpoenas bear the signature of a U.S. attorney, but agents have filled in blank subpoenas when people would not talk freely, and in one known case, have subpoenaed a witness to appear before a nonexistent grand jury.[22] Ralph Guy, a U.S. attorney in Detroit, has admitted that FBI agents are often sent out to question witnesses with grand jury subpoenas in their pockets.[23] Congress has repeatedly refused to delegate subpoena power to the FBI, feeling that no executive agency should possess what is essentially a judicial function.

In 1975, FBI agents descended upon the women's community in Lexington, Kentucky, and New Haven, Connecticut, allegedly pursuing a tip about Susan Saxe and Katharine Powers, wanted for a bank robbery in Boston. Hundreds of people were interviewed and asked detailed personal questions. Six refused to talk to the FBI in Lexington and were promptly sub-

poenaed before a grand jury purportedly investigating the "harboring of fugitives." FBI agents visited the families of some of the witnesses, urging them to pressure their children to cooperate with the bureau. In one case an eighty-four-year-old grandmother was visited by agents and told that her granddaughter was a lesbian. Six people were jailed for contempt after refusing to testify in Lexington. Five ultimately testified. The investigation was never pursued further, although one witness, Jill Raymond, spent fourteen months in the county jail. The exact pattern was repeated in New Haven where Ellen Grusse and Terry Turgeon refused to testify and spent a month in prison. Both were then subpoenaed upon release and spent an additional six months in prison until the prosecutor withdrew their subpoenas. No indictments were handed down in either community; none of the women was charged or tried for any offense, except refusing to cooperate in the dragnet. For the witnesses the choices were all unpalatable. To cooperate was to assist the government's surveillance of the women's movement and protected political activity; to refuse was to face contempt-of-court citations and jail. In either case, the grand jury created suspicion and divisions among friends; it invaded individuals' privacy and disrupted their political activities.

In New York City and Puerto Rico, people identifiable in some way with the Puerto Rican independence movement, the Puerto Rican Socialist party or the Puerto Rican Nationalist party, have subpoenaed to grand jury investigations under the guise of "bombing and explosives" investigations. In New York City, the FBI questioned the Puerto Rican community extensively, threatening to subpoena those who wouldn't answer questions about political activities and associates dating back many years. The court accepted the government's proposition that merely being associated in the Puerto Rican Socialist party was sufficient basis to justify a subpoena. Citizens attending court hearings were photographed and became objects of later FBI interrogations. Two witnesses, Lureida Torres in New York City and Edgar Maury Santiago in Puerto Rico, have already been jailed. The grand jury subpoena, receiving almost automatic judicial approval, served to brand Puerto Rican activists and organizations with a terrorist label without a shred of evidence, just as grand jury subpoenas had earlier stigmatized members of the VVAW as violent in 1972.

The Need for Grand Jury Reform

To date, no restraints have been imposed upon the use of grand juries as a weapon against political dissent. In 1975, a second wave of "political" grand juries began, starting with the Lexington and New Haven probes mentioned above. Other political grand juries have recently been convened against labor unions in Washington, D.C., and Florida, the American Indian movement at Wounded Knee, South Dakota, Oklahoma, and Iowa, and the Chicano movement in Colorado. There have been grand jury proceedings in the Symbionese Liberation Army/Patty Hearst case in Pennsylvania and in California, and in the filming of a movie made on Weather Underground in Los Angeles. In addition, radical defense lawyers and legal workers are now being subpoenaed in political cases across the country and asked for their records and/or information about their clients.[24]

Shirley Hufstedler, a judge on the Ninth Circuit Court of Appeals, observed recently:

> *Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression.*[25]

The "cruel twist" continues as yet unchecked.

Footnotes

1. *U.S.* v. *Dionesio*, 410 U.S. 1 (1973).
2. Hearsay: *Costello* v. *U.S.*, 350 U.S. 359 (1955). Illegal searches: *U.S.* v. *Calandra*, 94S.Ct.613 (1974). Warrantless wiretap: *U.S.* v. *Gelhard*, 408 U.S. 41 (1972).
3. *U.S.* v.*Mandujano*, 44 U.S.L.W. 4629, 0000 U.S. 0000, (May 19, 1976).
4. See generally *Memorandum on the Grand Jury*, prepared by the Office of Policy and Planning, U.S. Department of Justice, for the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, June 6, 1976, pp. 59-63.
5. "A Kind of Immunity That Leads to Jail: The New Grand Jury," by Paul Cowan, *New York Times* magazine, April 29, 1973. (Hereafter cited as Cowan article.)
6. *Blair* v. *U.S.*, 250 U.S. 273.282 (1919).
7. *Branzburg* v. *Hayes*, 408 U.S. 665.668 (1972).
8. "Annals of Law: Taking the Fifth," by Richard Harris, *New Yorker*, April 19, 1976.
9. See generally *Kastigar* v. *U.S., 406 U.S. 44 (1972).*
10. *Cowan article.*
11. *Cowan article.*
12. *Cowan article.*
13. Normal conviction rate: "The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?" McClellan, 46 *Notre Dame Lawyer*, 55, 60 (1970), cited in *The Grand Jury* by Leroy Clark (New York: Quadrangle, 1975), p. 50. ISD conviction rate: "Who Is Guy Goodwin and Why Are They Saying Those Terrible Things about Him?" by Lacey Fosburgh, *Juris Doctor*, January 1973.
14. The testimony of Senator Edward M. Kennedy, Hearings on the Fort Worth Five and Grand Jury Abuse before the

House Judiciary Subcommittee No. 1, March 13, 1973.
15. *The Grand Jury*, pp. 47-48.
16. Grand Jury "Horror" Stories, compiled by Barry Winograd, March 15, 1973: Seattle, p. 6; Tucson, p. 4; Detroit, p. 6. Available from Coalition to End Grand Jury Abuse, 105 2nd St., N.E., Washington, D.C. 20002.
17. "Arrest in Capitol Bombing Called 'Fishing Expedition,' " by Timothy S. Robinson, *Washington Post*, Oct. 17, 1975.
18. Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," *The Nation*, Nov. 19, 1973.
19. *U.S.* v. *Briggs*, 514 F 2nd 794, 805-806 (5th Circuit 1975).
20. 8 Moore's Federal Practice 6.02[1][b].
21. Cowan article.
22. In re Grand Jury Investigation, Des Moines, Iowa, in the matter of Martha Copleman, U.S. District Court, Southern District of Iowa, M-1-59.
23. "The FBI Connection," *Grand Jury Report*, published by Coalition to End Grand Jury Abuse (Winter 1976), p. 5.
24. "Grand Juries: A History of Repression," *Quash*, published by Grand Jury Project, 853 Broadway, New York City 10003, January 1976, pp. 13, 15.
25. Barry Winograd and Martin Tassler, *Trial*, January/February 1973, p. 16.

For More Information on Grand Juries:

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Coming in *First Principles*

Re-Constitutionalizing the Grand Jury, by Staff Attorneys at the Center for Constitutional Rights; scheduled for publication next winter. This article will provide an historical and constitutional analysis of grand jury abuses, discussing the conflict between its intended function as a protective, accusatorial body and its use as an inquisitorial weapon of the executive. The article will address the fundamentals of confining the federal grand jury to constitutional limits.

Grand Jury Reform Bills
Now under consideration before Congress

	HR11660 (HR2986)	HR6006	HR1277	HR6207	S3274
Witness consent required before immunity may be granted	X				
Subpoena must contain notice of: right to counsel in grand jury room, right against self-incrimination, whether witness is a potential defendant, subject matter of investigation, criminal statutes involved	X	X	X	X	X
Witness may not be required to testify if the court finds: the primary purpose is to secure information for person already indicted; appearance would be unreasonable; or issuance of subpoena is punitive	X	X		X	X
No subsequent confinement for refusing to testify re same transaction	X	X	X		X
Period of confinement reduced from 18 months to 6 months	X	X	X	X	X

The SWP and the FBI

Who Was Actually Breaking the Law?

BY DAVID ATKINS

Just over three years ago, the Socialist Workers Party, a legal political organization of some 1,700 members, filed a class action damage suit in federal court naming as defendants the attorney general, the FBI, the CIA, the Secret Service, Army Intelligence and other agencies of the federal government.[1] The SWP and its youth affilliate, the Young Socialist Alliance, claimed that for over thirty years their members were subjected to systematic harassment by the U.S. government in the form of "employment discrimination," "excessive interrogation," wiretapping, mail opening, and burglary. When the allegations were first made, they were, even in the midst of Watergate, generally "dismissed as clumsy radical propaganda."[2] We now know differently; for not only is there evidence to back up these charges, but there is also evidence that such activities have gone on long after the government said they were ended.

The civil suit filed by the SWP in June, 1973, is responsible for exposing some of the most shocking abuses of the intelligence agencies, as well as for triggering a criminal investigation of some of those abuses. Since the court has compelled the disclosure of documents not relating exclusively to the SWP, the public has learned for the first time about such government activities as the FBI's campaign against the Black Panthers, the SDS, and other groups of the New Left. It was the SWP suit which forced the disclosure of much information about "COINTELPRO," the FBI's covert "war" against political dissent. It has been the government memos and directives disclosed in the course of this litigation which have proven that all along the real "terrorists" were not members of fringe political parties but agents of the government.

The documentation of the intelligence bureaucracy's clandestine SWP operations illustrates their gross misperception of the party's influence. We know that this Trotskyite political party, whose total membership would barely "fill a football stadium,"[3] was targeted as a "threat" to the "security of the nation," even though not one of its members was ever indicted as the result of 30 years of surveillance. We know, for instance, that the FBI intercepted the mail of a 15 year old student who merely contacted the SWP about information for a high school project. We know that "in the same decade that crime rates in American cities escalated . . . the men of the . . . FBI were working at a fever pitch to drive a scout master in Orange, N.J. from his job."[4]

The harassment of the SWP also provides the paradigm of the purposes and means of what is, ineffect, an intelligence community conspiracy. For the abundant evidence suggests that in scope and duration, no other group has been targeted as extensively as the SWP. The acknowledged purpose of all COINTELPRO operations was to "expose, disrupt, and otherwise neutralize" lawful political activity.[5] The FBI has subsequently justified its disruption as merely an effort to "alert" the public to the "dangers and objectives of Marxist-Leninist revolutionaries."[6] But the suit has established that, as early as 1945, the Bureau attempted to prevent SWP members not suspected of breaking any laws from exercising their First Amendment rights. The documents released in the SWP suit reveal that the methods employed have been even more sweeping and illegal than alleged in the original SWP complaint, or even in the Senate Intelligence Committee report. There have been even more phony mailings, bogus "front" organizations, agents provocateur, "shakedown" interrogations, mail openings, and burglaries than originally suspected. There is now evidence indicating that violent crimes — arson, kidnapping, and assault — took place as well.[7]

Nor has the FBI been working alone. The CIA has admitted to burglarizing and tapping SWP members while abroad. Army Intelligence admits it "intercepted" at least two letters relating to SWP activities. The IRS has provided both the CIA and FBI with tax information on SWP officials. Even the Secret Service clearly exceeded its statutory authority by monitoring the 1971 SWP convention in Houston.

This is the kind of information which, due to the SWP suit, has been extracted from government file cabinets around the country. But many of the recent disclosures take on a new meaning because they raise the question of whether these activities have actually ended. Executive branch spokesmen have been treating their illegal activities as if they were all in the past; the disclosures made in the SWP suit do not allow such confidence.

It was the Bureau's contention that all "black bag jobs" ended on June 19, 1966 with J. Edgar Hoover's

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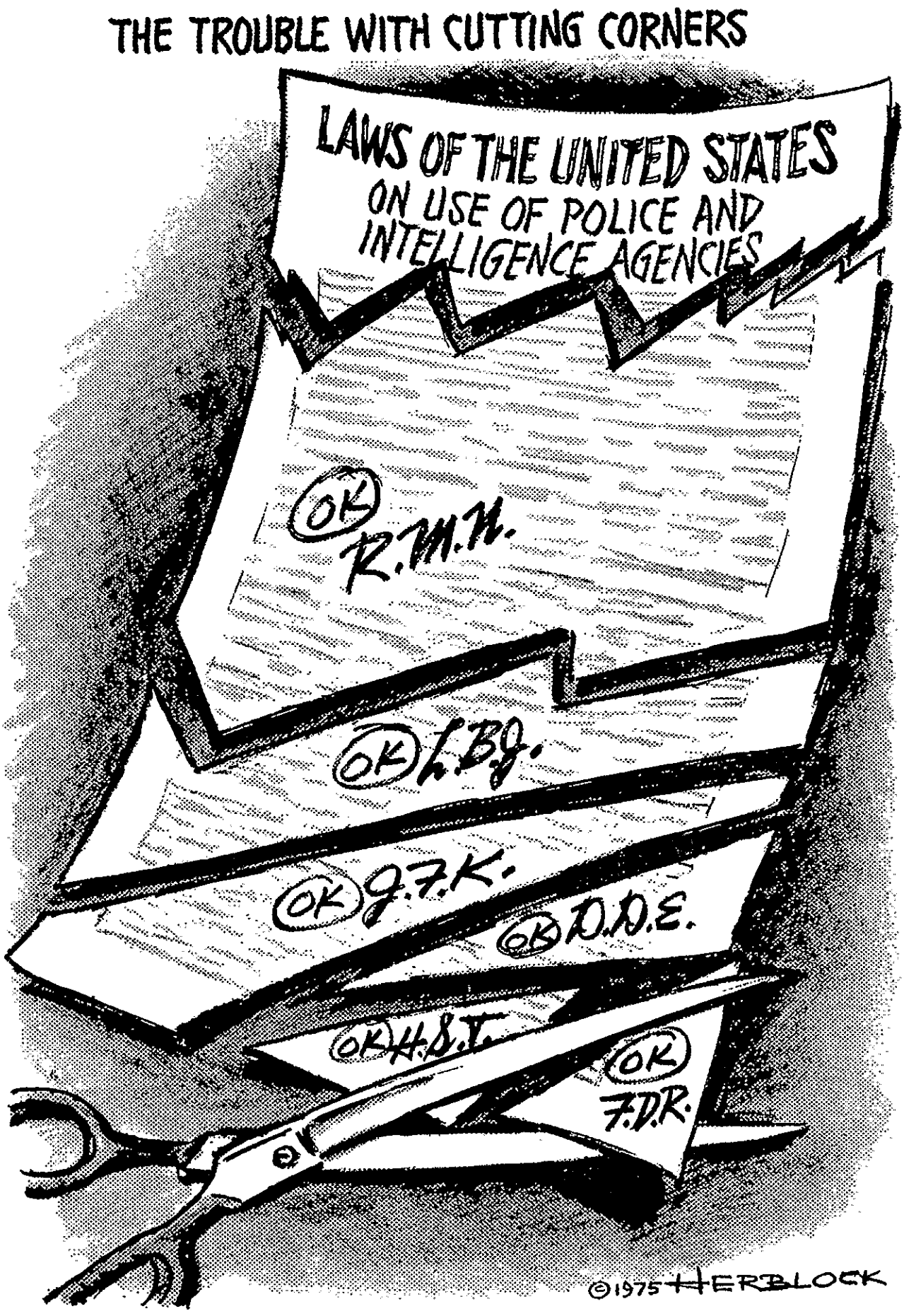
THE TROUBLE WITH CUTTING CORNERS
LAWS OF THE UNITED STATES
ON USE OF POLICE AND
INTELLIGENCE AGENCIES
OK R.M.N.
OK L.B.J.
OK J.F.K.
OK D.D.E.
OK H.S.T.
OK F.D.R.
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order that "no more such techniques must be used."[8] Director Clarence Kelley repeatedly assured the Church Committee and President Ford that all domestic burglary had, in fact, ended. But the hard evidence makes clear that this is not so. The Senate report lists 238 burglaries from 1942 *up until* 1968. It was in 1968, for example, that the stolen briefcase of SWP Presidential candidate Fred Halstead came into the possession of the FBI. In June, 1976 came the report that at least 20 burglaries of SWP headquarters in New York occurred between 1970 and 1975; that two took place in Detroit during 1971 and 1972; and that numerous "trash covers" (a practice also claimed to have been ended) were carried out in March and August 1975. On June 30, 1976, Director Kelley was forced to concede that yes, his previous statements were incorrect, and that yes, during the height of the Watergate and intelligence agency investigations, his G-men were committing burglaries.

Kelley will in all likelihood be forced to change another of his positions, namely that when Hoover ordered it terminated on April 27, 1971, COINTELPRO "disruption" ended. This assertion, made even in the government's court motions in the SWP suit, is also not true. There is now strong evidence, for example, that a COINTELPRO operative, Joseph Burton, worked for the Bureau until July, 1974. Burton says that with FBI funding he headed a phony left-wing organization, "The Red Star Cadre," in order to harass Vietnam Veterans Against the War and other groups protesting at the 1972 Republican convention. He says that he infiltrated and attempted to disrupt two labor unions in Tampa, Florida during 1973.[9] Even more disturbing than the Burton disclosures are documents relating to the Bureau's funding and arming of the paramilitary Secret Army Organization (SAO) which intimidated and terrorized Vietnam protesters, including members of the SWP, until 1972. This effort, largely centered in the San Diego area, led to indictments of several SAO members for the 1972 shooting of Paula Tharp, an anti-war activist associated with the SWP.[10]

These revelations of fairly recent burglaries and terror tactics are significant for a number of reasons. They catch the government in some embarrassing lies, and indicate that the intelligence agencies are not controllable by simple orders from the top. They also refute the oft-repeated explanation that it was simply Hoover's "obsession" with the left which motivated the dirty tricks. More importantly, the recent reports raise the possibility that such activities have not ended at all. Certainly official attitudes haven't changed enough to offer the public any comfort,[11] and indeed many of the government affidavits in the SWP suit do not indicate whether a particular illegal practice has actually ended.[12] Moreover, the revelation of a break-in carried out against the Denver SWP by an FBI informer on July 7, 1976, after the Justice Department investigation of Bureau misconduct had begun, gives ample proof that the government's political terrorism and arrogance before the law have not ended.

The most dramatic meaning of post-1971 illegalities relates to criminal prosecutions. Up until now, the intelligence agencies' defense has been to point out that the statute of limitations on their past wrongdoing had run out. This explains why they have so emphatically denied the allegations of crimes committed within the last five years. The argument has become untenable however in the face of documented "second story jobs" carried out as recently as July 7 of this year. As each new revelation appeared this summer the Civil Rights Division of the Justice Department was forced to widen its investigation into official misconduct and indictments of individual agents and their superiors may be handed down. The significance of this should not be understated, for such indictments would bring about the first criminal prosecutions for intelligence abuses not related to Watergate.

It is reported that agents and officials of the Federal Bureau of Investigation have had a bad case of "the shakes" lately.[13] This illustrates perhaps how important the threat of prosectuion for official lawbreaking is. Presidential Commissions, or Congressional hearings, or Attorney General's Guidelines can work without enforcement of the law. If there is evidence of criminal wrongdoing, criminal investigations and indictments should follow. And indeed the record of the SWP lawsuit indicates that quite specific laws were quite specifically broken.[14]

When the Socialist Worker's Party first claimed three years ago that it was the victim of a criminal conspiracy, it was forced to assert its constitutional rights alone, through a civil damage suit. Now that the party's "clumsy" allegations have been borne out, they are at last the subject of a full scale criminal inquiry. However uncertain the outcome, a truly independent prosecution brought against the burglars, tappers, and mail openers in the U.S. government will mean that the SWP members are no longer alone in their effort to enforce their rights. Thus, prosecutions will, to some extent, vindicate the SWP and others who for so long have been labeled "threats to democracy" by the seasoned political police in the intelligence agencies. But more importantly, such prosecutions will finally vindicate the system of "law and order" so unconscionably abused or ignored by the very persons entrusted to enforce it.

Footnotes

1. *Socialist Workers Party* v. *Attorney General*, 73 Civ. 3160 (S.D.N.Y.).
2. *New York Times*, April 4, 1976, p. 30.
3. *New York Times*, March 23, 1975, Section 4, p. 2.
4. Ibid.
5. Quoted in Senate Intelligence Committee, *Final Report*, Book III, p. 5.
6. Government brief in the SWP case quoted in *New York Times*, January 11, 1974, p. 12.
7. *New York Times*, July 11, 1976, p. 20.
8. Hoover directive, quoted in *Washington Star*, May 10, 1976, p. A1.
9. *New York Times*, February 24, 1975, p. 36.
10. *New York Times*, June 27, 1975, p. 4.
11. At a news conference in July, 1975, Kelley, referring to illegal break-ins said, "I do not note in these activities any gross abuse of authority."
12. See CIA Director George Bush's affidavit in the SWP

case regarding his agency's tapping and burglarizing U.S. citizens abroad. *Washington Post*, July 17, 1976, p. A1).
13. *New York Times*, June 24, 1976, p. 2.
14. The relevant criminal statutes are as follows:
• Section 733.121, Title Five of the Code of Federal Regulations makes it a misdemeanor for any federal employee to "interfere with" the "selection of any candidate for the office of President."
• Section 2236, Title 18 of the U.S. Criminal Code prohibits any federal official from searching "any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause, searching any other building or property without a search warrant . . ."
• Section 241 of the Criminal Code punishes anyone "who conspires to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . ." This includes, of course, the right to speech, assembly and petition as guaranteed by the First Amendment, as well as the right to a reasonable expectation of privacy as guaranteed by the Fourth, (see *U.S. v. Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974).
• Burglary — or the unlawful entry into a premises with an intent to commit a crime therein — is a violation of state laws.

S.W.P. and the FBI

A Chronology

May 24, 1976 In documents released in connection with the SWP's $37 million lawsuit, the Secret Service, one of the defendants in the suit, admits that it monitored the 1971 SWP convention in Houston. (*Washington Post*, 5/25/76, p. A3)

June 12, 1976 28 FBI agents have been informed that they are under investigation by the Justice Department's Civil Rights Division in connection with the alleged SWP burglaries.

June 16, 1976 The FBI instructs the agents under investigation not to consult with counsel until a security clearance is granted to each lawyer. (*Washington Post*, 6/25/76, p. A6)

June 23, 1976 The *Los Angeles Times* reports that at least 20 FBI agents are under investigation for illegal break-ins committed during the last five years. (*Washington Post*, 6/23/76, p. A1)

June 24, 1976 The *New York Times* reports that Andrew J. Decker, an assistant director of the FBI, has retained a lawyer because of the investigation of post-1971 burglaries. It is also reported that two Detroit burglaries committed in 1971 and 1972 are under investigation. (*New York Times*, 6/24/76, p. 1)

June 25, 1976 The *New York Times* reports that according to "a well-placed source," FBI agents carried out at least one kidnapping in the past five years. Agents of the FBI's New York field office allegedly posed as right-wing opponents of the anti-war movement and seized a radical political figure in an effort to frighten him and "deter his political activity." One source claims that the victim was "roughed up" as well. (*Washington Star*, 6/25/76, p. 1)

June 26, 1976 Documents obtained in the SWP suit indicate that FBI burglaries of SWP offices continued until at least May, 1975. The documents describe items as having been "removed" or "recovered" from the party's headquarters on at least eight occasions in 1975. Other memos released disclose that FBI "trash covers" were carried out as recently as August, 1975.

The *New York Times* reports that a Federal grand jury has begun to hear evidence relating to the break-ins. (*New York Times*, 6/27/76, p. 16)

June 27, 1976 According to documents made public in the SWP suit, commendations and cash incentive rewards were recommended for six agents who burglarized SWP offices in New York 15 times between 1964 and 65. (*New York Times*, 6/28/76, p. 14).

June 30, 1976 FBI Director Kelley confirms that the Bureau carried out "a limited number" of burglaries in 1972 and 1973. Despite this admission, Kelley will not comment on the evidence that illegal entries continued through 1975. It is also reported that several Bureau officials have offered to talk to investigators in return for immunity from prosecution. (*New York Times*, 7/1/76, p. 1)

July 9, 1976 The *New York Times* reports that the Justice Department investigation of criminal misconduct within the FBI, has now extended to high ranking Bureau officials in Washington. It is also confirmed that allegations of illegal wiretaps, unprovoked assaults, the destruction of private property, and at least one kidnapping are under investigation. (*New York Times*, 7/9/76, p. 2)

July 11, 1976 Sources close to the Justice Department investigation, tell the *New York Times* that past FBI illegalities included car burnings and assaults carried out in efforts to disrupt the anti-war movement. It is also reported that FBI agents used

false law enforcement credentials in order to make entries without being connected with the Bureau. (*New York Times*, 7/11/76, p. 2)

July 16, 1976 In an affidavit filed in the SWP law suit, CIA Director Bush admits that "certain individual plaintiffs" in the case were the targets of wiretapping and burglary while they were abroad. The statement is the first official acknowledgement of CIA spying and harassment of U.S. citizens abroad. (*Washington Post*, 7/17/76, p. A1)

July 16, 1976 Director Kelley fires his Associate Director Nicholas P. Callahan in the face of increasing reports of criminal misconduct within the FBI. (*Washington Post*, 7/17/76, p. A1)

July 21, 1976 The Senate approves, 91-5, legislation creating a permanent special prosecutor's office independent of the Justice Department. The prosecutor would be authorized to investigate criminal misdeeds committed by any federal official. (*New York Times*, 7/22/76, p. 11)

July 26, 1976 It is reported that Justice Department attorneys investigating the CIA's 20 year old mail opening program, have recommended against the criminal prosecution of agency officials involved. (*New York Times*, 7/27/76, p. 2)

July 28, 1976 The Justice Department announces that it is investigating charges that Timothy Redfearn, a paid FBI informer arrested by Denver police on July 14 in an unrelated incident, carried out a burglary of SWP headquarters in Denver on July 7. In New York, District Court Judge Thomas P. Griesa, presiding in the SWP lawsuit, orders the FBI to turn over its files on Redfearn. The judge also orders the CIA to provide him with "unexpurgated" versions of documents relating to burglaries and electronic surveillance of Americans abroad. (*New York Times*, 7/29/76, p. 16; *Washington Post*, 7/29/76, p. A24)

July 28, 1976 In a disposition from the SWP suit made public today, FBI special agent George P. Baxtrum, Jr. admits, under oath, to having participated in "between 50 and 90" "surreptitious entries" of SWP offices in New York between 1958 and 1965. He also testifies that he was told that each "black bag job" had been authorized by Bureau headquarters in Washington. (*New York Times*, 7/29/76, p. 1)

July 30, 1976 An FBI agent in Denver testifies that his superiors in the Denver field office delayed for eight days telling local authorities that informer Timothy Redfearn had burglarized SWP offices on July 7. The Denver District Attorney's office announces that it is investigating a possible cover-up of the break in. (*New York Times*, 7/31/76, p. 12)

July 30, 1976 Richard G. Held, recently appointed to succeed Nicholas P. Callahan as Deputy Director of the FBI, acknowledges that he was involved in COINTELPRO "dirty tricks" as head of the Bureau's Minneapolis field office in the late '60's and early '70's. (*New York Times*, 7/31/76, p. 12)

July 30, 1976 The *Washington Post* reports that Justice Department investigators expect to begin presenting evidence of FBI burglaries to a federal grand jury in New York by the end of August. (Washington Post, 7/30/76, p. A1)

July 31, 1976 Complying with Judge Griesa's order, the FBI turns over nearly 2,000 pages of files relating to Timothy Redfearn. Included are documents stolen in the July 7 break-in in Denver. The records reveal that after Redfearn had committed at least 2 burglaries against the SWP in 1973 as well as the burglary of a private home on his own, his monthly salary was raised to $400, and Washington Bureau headquarters rated his performance as "excellent." (*New York Times*, 8/1/76, p. 1; *Washington Post*, 8/1/76, p. A1)

August 3, 1976 The *New York Times* reports that the Justice Department's investigation of FBI criminal misconduct has expanded to include the Washington, San Francisco, Los Angeles, and Denver field offices as well as more than 75 individual agents and officials. (*New York Times*, 8/3/76, p. 1)

August 3, 1976 Acting in the SWP lawsuit, Judge Griesa orders the FBI to release its files on six informers named by the SWP in court documents. The judge rules that the only information that can be deleted from the files would be the names of other informers not yet identified by the plaintiffs. (*New York Times*, 8/4/76, p. 37)

August 4, 1976 In a court hearing, Judge Griesa accuses the FBI of having provided "false" information about its paid informer Timothy Redfearn. Griesa says, "I can't imagine anything more important in this case," and asserts that the FBI's "falsity" in its depositions raises the possibility that "there might be widespread misrepresentations" in the testimony of Bureau officials. (*New York Times*, 8/5/76, p. 10)

August 11, 1976 In announcing a series of internal reforms, FBI Director Kelley effectively abolishes the Bureau's Internal Security Section, transferring investigations of radical political groups to the General Investigations Branch. (*New York Times*, 8/12/76, p. 1)

August 14, 1976 Documents discovered in the FBI's New York field office reveal that in 1970, the Bureau established a "Weather Fugitive" or "Weathfug" squad. The squad reportedly burglarized the property of friends and relatives of members of the Weather Underground in efforts to learn the whereabouts of fugitives. (*New York Times*, 8/14/76, p. 9)

August 16, 1976 The *New York Times* reports that the FBI intends to continue its 28 year old investigation of the SWP, despite the testimony of Bureau officials that party members have never been involved in foreign espionage. (*New York Times*, 8/16/76, p. 1)

August 17, 1976 A former Associate Director of the FBI, W. Mark Felt, admits that he approved the commission of two domestic burglaries. Felt says that the first burglary was carried out against the Arab Information Center in Dalls, while the second was intended to uncover leads to the whereabouts of Weather Underground members. (*New York Times*, 8/18/76, p. 1)

August 18, 1976 A former high ranking FBI official, Edward S. Miller, says that former director L. Patrick Gray authorized "surreptitious entries" by Bureau agents in the New York City area during 1972 and '73. (*New York Times*, 8/19/76, p. 31)

August 19, 1976 Under orders from Justice Department prosecutors and without advanced warning, file cabinets from the FBI's New York field office are seized and removed. The action indicates that investigators fear the possibility that crucial evidence in the case may be destroyed. (*New York Times*, 8/20/76, p. 1)

August 21, 1976 It is reported that in the course of their investigation of FBI break-ins in the New York area, Justice Department prosecutors have turned up "firm evidence" that between 1970 and 1973, Bureau agents assigned to the "Weathfug" squad intercepted mail and conducted illegal wiretaps and room buggings. The FBI has previously said that its mail theft program ended in 1966. (*New York Times*, 8/22/76, p. 26) ■

In The Courts

(continued from page 2)

July 7, 1976 *Forcade v. Knight*, Civ. Action No. 73-1258, (D.D.C.) Memorandum and Order. District Court Judge William B. Jones ruled that the White House's denial of press passes to two journalists "for reasons of security," "infringes on [their] First Amendment right to freedom of the press." The judge holds that while "protection of the physical safety of the President is a compelling interest . . . it must be achieved through standards narrowly and specifically drawn to ensure that . . . unnecessary restrictions or abusive censorship based upon an applicant's political tenets [does not result.]"

July 16, 1976 *Hobson v. Wilson*, Civil Action No. 76-1326, (D.D.C.) The National Capital Area ACLU filed a $2,000,000 damage suit against the District of Columbia police department and the FBI, charging that both agencies attempted to harass anti-war and civil rights groups by carrying out "unlawful surveillance," burglaries, and mail interceptions. The suit specifically alleges that "the FBI joined with the D.C. police in all or many of these activities as part of its unlawful 'Cointelpro/New Left' program." Among the plaintiffs are groups such as the Washington Area Women Strike For Peace, and the Emergency Committee On The Transportation Crisis, a residents association opposed to freeway construction.

July 30, 1976 *U.S. v. A.T.&T.*, Civ. Action No. 76-1372, (D.D.C.) Order. District Court Judge Oliver Gasch issued a permanent injunction forbidding the House Commerce Subcommittee on Oversight and Investigations from subpoenaing telephone company records of the government's warrantless national security wiretaps. The judge thus affirmed President Ford's contention that it would be an "unacceptable risk" to national security to let the subcommittee have the records it had subpoenaed from A.T.&T. Subcommittee Chairman John Moss later announced plans to appeal the order.

In The Literature

Congressional Publications

National Archives — Security Classification Problems Involving Warren Commission Files And Other Records, Hearings Before The Government Information and Individual Rights Subcommittee of the Government Operations Committee, House of Representatives, November 11, 1975, No. 68-952. The Abzug Subcommittee investigation of the Archives handling of the Warren Commission records and its general policy in FOIA cases.

Hearings on The Foreign Intelligence Surveillance Act of 1976, Subcommittee On Criminal Laws and Procedures of the Judiciary Committee, U.S. Senate, March 29, 30, No. 70-309. Testimony for and against on the national security wiretap bill (S. 3197) now pending before the Senate.

The Investigation of The Assassination of President John F. Kennedy: Performance of The Intelligence Agencies, Final Report of the Select Committee to Study Government Operations With Respect to Intelligence Activities, U.S. Senate, Book V, June 23, 1976, Report No. 94-7555. While the Church Committee finds no new evidence to "justify a conclusion that there was a conspiracy to assassinate President Kennedy," its fifth and final report calls for a reopening of the investigation by the new Senate Intelligence Committee. The report also finds that both the CIA and FBI failed to thoroughly investigate the events of November 22, 1963.

Government Reports

Interagency Classification Review Committee's 1975 Progress Report, May 28, 1976. A report to the President evaluating the government's classification and declassification system as well as the National Security Council's monitoring of government records. The study finds that requests for declassification review under President Nixon's Executive Order 11652 are up dramatically. Obtainable through the Interagency Classification Review Committee, National Archives Building, Washington, D.C., 20408.

Literature

Report to the President and the Secretary of Defense on the Department of Defense by the Blue Ribbon Panel, 1 July 1970 — Annex on Defense Intelligence (Fitzhugh Report); *A Review of the Intelligence Community*, March 10, 1971 (Schlesinger Report); and *Report of the Defense Panel on Intelligence* (1975)(Hall Report)

Three in-house studies of defense intelligence recently released as a result of FOIA requests by the Project on NS&CL. All three studies emphasize duplication and deficiencies in analysis. Fitzhugh and Hall reports available from the Department of Defense and Schlesinger Report from Office of Management and Budget, by making requests under the FOIA.

Periodicals

Cuba Review, Vol. VI, No. 2, "CIA: Conspiracy Makers," dealing with the CIA and use of assassination, undercover foreign policy, and terrorism against Cuba. Available from the Cuba Resource Center, Box 206 — Cathedral Station, NY, NY 10025, price: $1.25. Subscriptions: individuals, $5/yr.; institutions, $10/year.

The Privacy Report monitors data collection (including surveillance) by state, local, and federal governments, as well as by private institutions, and its impact on the individual's right to privacy. Published monthly by the American Civil Liberties Union Foundation, subscriptions are $15/yr. ($5/yr. for students) from Privacy Report, ACLU Foundation, 22 E. 40th St., NY, NY 10016. Trudy Hayden is editor.

Law Review Articles

"National Security and the Amended FOIA," 85 Yale L.J. 401 (January, 1976). A critique of the "vague and elastic" national security exemptions to the FOIA. "The question is not . . . whether courts have enough expertise to assimilate the factual information necessary to conduct such a review, but whether the 'damage to national security" standard is specific enough to permit the use of this expertise even if available to the courts."

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Point Of View

(continued from page 16)

mous in holding that Col. Abel was entitled to the full protection of the Fourth Amendment. If the case of Abel, a KGB agent illegally in the United States to spy, did not even raise the issue of a national security exception to the Fourth Amendment, it is difficult to believe that any search can.

In 1967 the Supreme Court extended the protections of the Fourth Amendment by holding that they applied to "people and not places" and therefore applied to wiretapping and other electronic surveillance even when there was no physical trespass onto private property. In an enigmatic footnote, the Court left open the possibility that the government might be able to dispense with the warrant when wiretapping for national security purposes. It was only in 1975 that the Justice Department, intervening in the Fielding break-in case in the Court of Appeals, put forward the startling proposition that this possible exception to the warrant requirement for wiretapping applied also to burglaries.

A casual reading of the decisions in that case has led to the erroneous belief that the opinions of the court lent some authority to the Justice Department's position. Nothing could be further from the truth. While it is the case that the foot soldiers in the Ellsberg Psychiatrist's office burglary did have their convictions reversed, the two judges on the three-judge panel who voted to reverse did so on the basis of the law relating to conspiracy to deprive individuals of their constitutional rights and the belief that the foot soldiers were unwitting dupes. It was in their written opinions affirming Ehrlichman's conviction, that the three judges gave the court's views on the legality of such break-ins. Writing for a unanimous panel Judge Wilkey held that at least where the president or the Attorney General has not approved the specific burglary, such break-ins without a warrant are illegal even if national security is involved. In a concurring opinion joined by the third member of the panel, Judge Leventhal argued persuasively that no such exception exists even if the President personally orders the burglaries. Neither opinion suggested that the court was deciding a new or difficult question.

Since there is no claim that the President or the Attorney General authorized any specific FBI burglaries (or that they even knew about the program) that are now under investigation, the holding in *Ehrlichman* is enough to establish the illegality of all FBI burglaries without the national security rationale and to require that these cases be put before a grand jury.

That the Justice Department has not sought indictments underscores the need for a permanent special prosecutor to oversee the intelligence agencies. The Attorney General cannot be simultaneously responsible for gathering foreign intelligence in the United States and for punishing those who are overzealous in performing that mission. Such an arrangement is a classic conflict of interest and the results have become all too apparent.

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798

Point of View

"Legal" Burglaries

MORTON H. HALPERIN

The revelations wrung from a reluctant FBI that the Bureau has conducted burglaries at least as recently as 1973 has finally prodded the Justice Department into what appears to be the first serious criminal investigation of intelligence agency lawlessness. The investigation, under the direction of Stanley Pottinger, has grown out of revelations of the Socialist Workers Party lawsuit and is reportedly focussed on the SWP and on burglaries of friends and relatives of the Weather Underground. It shows every sign of being a thorough investigation aimed at the senior bureau officials who approved the break-ins — within its self-defined limits, that is.

The limits that have apparently been put on the investigation should be a matter of great concern. The agents under investigation have been defending themselves by asserting that the burglaries were legal because they were justified on "national security" grounds. The Justice Department's position, according to press accounts, is that "national security" is a defense only if those burglarized are connected with a foreign power. The Weather Underground burglaries cannot be so defended, it is said, because the Bureau had not justified them at the time on the basis that the Weather Underground was connected with Cuba. However, according to press accounts, other burglaries — including one approved by acting FBI Director L. Patrick Gray and directed at an Arab Information Center in Texas — are not being investigated precisely because they were justified in advance as being targeted on individuals connected with a foreign power.

The Department of Justice has been acting on the belief that there is a "national security" exemption to the Fourth Amendment which comes into play when a burglary is directed against a foreign power or its agents. In such cases FBI agents may enter a home or office surreptitiously and without a warrant from a court. Yet the Constitution makes no such exception. No court in the United States has ever seriously considered the possibility that it exists; the Fourth Amendment was written to protect individuals in their homes against the forced entry of the state. It would have amazed those who fought for a Bill of Rights in the Constitution to know that 200 years later the executive would claim that it could get around this explicit check on its power simply by telling itself that the individual whose home it intended to enter was collaborating with a foreign power.

Indeed, the Supreme Court took care of this issue at the height of the cold war. One Col. Abel, a Soviet national and an officer in its KGB, was arrested and searched incident to a deportation action. The Supreme Court split on whether the search had violated the Fourth Amendment, but it was unani-

(continued on page 15)